RESCISSION FOR BREACH OF WARRANTY.

Last year in the Harvard Law Review[1] I wrote an article in which I advocated the doctrine of the Massachusetts courts which allows rescission of an executed sale as a remedy for breach of warranty. At the beginning of my article I stated that nearly as many courts have followed the Massachusetts rule as have followed the English law[2], and cited decisions from twelve States besides Massachusetts in support of the proposition.

In a recent number of this Review, Professor Burdick has given the results of an examination by him of the cases which I cited, and he concludes that in the main these cases do not support my statement. Not being satisfied with the criterions in this article, I now venture to return to the support of my original thesis and to criticise my critic. In order to bring out without unnecessary words the precise language on which I rely in the authorities that I quote, I have in several instances italicised a phrase or sentence. The italics are in every case mine.

My learned brother begins his discussion by seeking an authoritative statement of "the Massachusetts rule" and of "the English law." He finds this in extracts from Bryant *v.* Isburgh[3], and Street *v.* Blay[4], and after quotations from these cases he proceeds: "It is apparent from these judicial statements that the question in dispute is not whether the purchaser can rescind for the breach of any sort of warranty; but whether he can rescind for the breach of a collateral or subsidiary warranty." Now I did not write upon the narrow proposition which is thus marked out, nor were my cases cited in support of it. I wrote and cited cases upon the general question "whether a buyer who has purchased goods with a warranty may return the goods and rescind the sale if the warranty is broken," and my article makes it sufficiently clear, I think, that I attached no im-

[1] 16 Harv. L. Rev. 465. [2] 4 Col. L. Rev. 1.

[3] (1859) 13 Gray (79 Mass.) 607.

[4] (1831) 2 B. & Ad. 456 (22 E. C. L.)

portance to the question whether the warranty were express or implied, to use the old terms, or a true warranty or a condition, to use the common modern phraseology, provided title had passed. It is not surprising that some of the decisions which I collected should not support a proposition for which I did not cite them.

The replication to my defense is obvious and is contained by necessary implication in my critic's argument, namely, that the real distinction between the Massachusetts rule and the English law lies in the treatment of collateral warranties and that the treatment of implied warranties or conditions is identical in the two jurisdictions. If, therefore, I have assumed another line of cleavage, it will be said that I have erred in so doing and my collection of cases must be revised. Here I take issue. I maintain that the Massachusetts law allows rescission of an executed sale for breach of warranty whether the warranty be express or implied, collateral or a so-called condition, and that the English law denies rescission of an executed sale for breach of any warranty or promissory condition whatever its nature, though it allows, as does the law of every jurisdiction, the buyer to take the goods temporarily into his possession to inspect them.[1]

So far as the Massachusetts law is concerned, the extract quoted from Bryant *v.* Isburgh[2] seems a sufficient statement. "He to whom property is sold with express warranty as well as he to whom property is sold with implied warranty may rescind the contract for breach of warranty, by a seasonable return of the property." My critic says it is apparent from this extract and the one which he quotes from Street *v.* Blay[3] that the difference between Massachusetts and England relates not to the remedy for breach of any sort of warranty, but to the remedy for the breach of a collateral or subsidiary warranty, I must, therefore, infer that he regards the extract which he quotes from the English case as stating not only that the

[1] The buyer may return the chattel if he has kept it "such a time only as is necessary for a fair examination, in which case he cannot be considered as having received it at all." Smith's Leading Cases, (11th ed.) II. 27, 28.

[2] (1859) 13 Gray (79 Mass.) 607.

[3] (1831) 2 B. & Ad. 456 (22 E. S. L.)

English law denies rescission for breach of an express warranty but that it allows that remedy for breach of an implied warranty or condition. Lord Tenterden denies explicitly enough the right of rescission for breach of warranty, but I cannot think he either thought or said that if title had passed rescission might be allowed for breach of a promise contained in the description of the goods. The only phrase which could by any chance be thought to justify such an inference is contained in the qualification of his statement that rescission of an executed sale is not allowable "unless there has been a condition in the contract authorizing the return." Obviously what Lord Tenterden meant was a condition subsequent, authorizing in express terms the rescission of the contract and return of the goods[1]. That he did not mean promises which form part of the description of the goods and which are now called conditions in England—is evident from the fact that though such promises were of course perfectly familiar at the time when Lord Tenterden spoke they were not then called conditions[2], but implied warranties, and were included in his broad general statements that rescission was not allowable for breach of warranty[3].

In another portion of the opinion, Lord Tenterden defines his position as to descriptive statements more exactly. "It is to be observed, that although the vendee of a specific

[1] See the almost identical statement by Williams, J., in Behn *v.* Burness (1863), 3 B. & S. 751, 755: "If a specific thing has been sold with a warranty of its quality, under such circumstances that the property passes by the sale, the vendee having been thus benefited by the partial execution of the contract, and become the proprietor of the thing sold, cannot treat the failure of the warranty as a condition broken (*unless there is a special stipulation to that effect in the contract*). So in Couston *v.* Chapman (1872) L. R. 2 Sc. App. 250, 254. Cases where there was such a special stipulation are Head *v.* Tattersall (1871) L. R. 7 Ex. 7; Elphick *v.* Barnes (1879) 5 C. P. D. 321. See further Burdick on Sales, § 240.

[2] The modern English distinction was emphasized by Lord Abinger in his opinion in Chanter *v.* Hopkins (1838) 4 M. & W. 399, decided seven years after Street *v.* Blay (1831) *supra*, but under the better phraseology of "non-compliance with the contract." The word condition was not used in this connection until 1851 in Dowson *v.* Collis, 10 C. B. 523, 530. Even then, it is improbable that Williams, J., who used the word intended to give it the wide meaning it is now given. Compare Jones *v.* Bright (1829), 5 Bing. 533, 543, where implied promises now called conditions are called warranties by Best, C. J.

[3] Thus in Blackburn's Contract of Sale, (2d ed.) 495, the decision is treated as involving the broad proposition that where the property in the goods has passed to the vendor he cannot return them.

chattel, delivered with a warranty, may not have a right to return it, the same reason does not apply to cases of executory contracts, where an article, for instance, is ordered from a manufacturer, who contracts that it shall be of a certain quality, or fit for a certain purpose, *and the article sent as such is never completely accepted by the party ordering it.* In this and similar cases the latter may return it as soon as he discover the defect, *provided he has done nothing more in the mean time than was necessary to give it a fair trial.*"

It is not necessary, however, to confine ourselves to an examination of Street *v.* Blay in order to show that rescission of title is not allowed in England as a remedy for breach of a promissory condition. This was expressly decided in Parsons *v.* Sexton.[1]

In this case the seller offered to provide "a fourteen horse engine" and the buyer accepted as follows "in consideration of your supplying us with a certain fourteen-horse engine which our foreman has inspected" etc. The engine was delivered and title passed but was not of fourteen horse power and the buyer asserted the right to reject it. The seller's breach of obligation was held no answer to an action for the price though a possible ground for a cross-action. The stipulation as to the power of the engine was obviously part of the description and not collateral. True it was a case of a contract to sell and sale of a specific engine,[2] but in all cases where the question of rescission of title is involved the goods, whether or not originally specified in the contract, must have become specific by subsequent appropriation by the seller assented to by the buyer.

In 1863, Williams, J., in Behn *v.* Burness said: "In cases where the thing sold is not specific and the property has not passed by the sale, the vendee may refuse to receive the thing proffered him in performance of the contract, on the ground, that it does not correspond with the descriptive statement, or in other words, that the condition expressed

[1] (1847) 4 C. B. 899; 2 C. & K. 266.

[2] In the criticisms which my learned brother passes upon the cases I cited I cannot see that he distinguishes between specified and unspecified goods. He apparently, puts any case under the ban if the alleged warranty was originally part of a descriptive statement.

[3] (1863) 3 B. & S. 751. The statement was quoted with approval in McGregor *v.* Harris, 30 New Brunswick, 456, 483.

in the contract has not been performed. *Still if he receives the thing sold, and has the enjoyment of it, he cannot afterwards treat the descriptive statement as a condition, but only as an agreement for a breach of which he may bring an action to recover damages.*"

In 1872 in Couston *v.* Chapman,[1] a Scotch case, involving the right to rescind a sale by sample for non conformity of the goods with the sample, Lord Chelmsford took occasion to compare the English and Scotch law, as follows: "In England, if goods are sold by sample, and they are delivered and accepted by the purchaser, he cannot return them; but if he has not completely accepted them, that is, if he has taken the delivery conditionally, he has a right to keep the goods a sufficient time to enable him to give them a fair trial, and if they are found not to correspond with the sample, he is then entitled to return them.

"As I understand the law of Scotland, although the goods have been accepted by the purchaser, yet if he find that they do not correspond with the sample, he has an absolute right to return them."

The obligation of the seller that the bulk should correspond to the sample is classified as a condition.[2] Nevertheless this quotation shows that by the English law the buyer cannot return the goods and rescind the title if he has accepted the goods. He is entitled only to opportunity to inspect and test, as a preliminary to his determination whether or not he will accept the goods.

The Sale of Goods Act, in sec. 11 (*c*), seems to lay down the same rule, though the last clause of the section may offer a chance for argument; "Where a contract of sale is not severable, and the buyer has accepted the goods, or part thereof, or where the contract is for specific goods, the property in which has passed to the buyer, the breach of any condition to be fulfilled by the seller can only be treated as a breach of warranty and not as a ground for rejecting the goods and treating the contract as repudiated, unless there be a term of the contract, express or implied to that effect."

So in 1900, Varley *v.* Whipp[3] in speaking of the right

[1] (1872) L. R. 2 Sc. App. 250. [2] Sales of Goods Act, Sec. 15.
[3] [1900] 1 Q. B. 513.

claimed by the buyer to reject for its non-conformity with the seller's statements a machine held to have been purchased by description, Channell, J., said: "If the property in the machine passed prior to July 2, nothing that the buyer could do afterwards would divest it. *The question is did the property pass.*"

To the same effect the law is laid down in the second edition of Blackburn on the contract of sale.[1] "Having considered the position of the parties where the vendor has not tendered the goods, the next question is what are their rights where the vendor does tender. It will be convenient to examine in the first place those cases in which the property in the goods has passed to the vendee. In that case he cannot return them. After accepting them so that the property in them has passed to him, he cannot, when he comes to examine them and discovers that they are not what he contracted for, call upon the vendor to take them back again."

Benjamin says[2] "Although a man may refuse to perform his promise till the other party has complied with a condition precedent, yet, if he has received and accepted a substantial part of that which was to be performed in his favor, the condition precedent changes its character and becomes a warranty, or independent agreement, affording no defence to an action, but giving right to a [counter-claim[3]] for damages. The reason is, that it would be unjust under such circumstances that a party who has received a part of the consideration for which he bargained should keep it and pay nothing because he did not receive the whole."

It is true that in a later section[4] the same author says, "After the property in the specific chattel has passed to the buyer, it may happen that he discovers the goods bought to be different in kind or quality from that which he had a right to expect according to the agreement. In such case it is necessary to distinguish whether the defect be one in the performance of a condition or of a warranty. In the

[1] p. 495. [2] § 564.

[3] The early editions of the book read "cross action" instead of "counter-claim."

[4] § 887.

former case he may refuse to accept the goods and reject the contract, but not in the latter."

The author cites no authority for this statement. In its broad form it is inconsistent with the previous extract, as well as with the other authorities I have cited. It is, therefore, erroneous unless confined to a very limited class of cases of which Young *v.* Cole[1] is the type. In that case an action for money had and received was allowed by a broker against his customer to recover the amount paid over to the customer as the proceeds of certain Guatemala bonds, which were unstamped by the Government of Guatemala and were therefore invalid. The broker, compelled by the rules of the Stock Exchange, had previously repaid the purchaser the price the latter had paid. The reasoning of the Court appears in the following extract from the opinion of Tindal, C. J.:

The plaintiff "delivered the money to the defendant on an understanding that the bonds he had received from the defendant were real Guatemala bonds, such as were saleable on the Stock Exchange. It seems, therefore, that the consideration on which the plaintiff paid his money has failed as completely as if the defendant had contracted to sell foreign gold coin and had handed over counters instead. It is not a question of warranty; but whether the defendant has not delivered something which, though resembling the article contracted to be sold is of no value."

In Dawson *v.* Collis, Williams, J., referred to this case as one of condition,[2] and it is probably on this statement that Benjamin's section is based. The decision, however, cannot stand for the doctrine that in every case presenting what is called a condition under the nomenclature of the Sale of Goods Act rescission of an executed transfer is permissible.

When Tindal said "It is not a question of warranty" he necessarily included under the head of warranty the implied warranties as they were then called though now called con-

[1] (1837) 3 Bing. N. C. 724. Similar decisions are (1814) Jones *v.* Ryde, 5 Taunt. 488; (1849) Westropp *v.* Solomon, 8 C. B. 345; Gompertz *v.* Bartlett, 2 E. & B. 849; (1854) Gurney *v.* Womersley, 4 E. & B. 133—all cases of void securities. See also Sparling *v.* Marks, 86 Ill. 125.

[2] (1851) 10 C. B. 523, 530. At this time the word "condition" in sales had not acquired its present meaning.

ditions. That Williams, J., in Dawson *v.* Collis did not mean that any breach of a promissory condition would afford ground for a rescission of an executed sale is evident from his own explicit statement to the contrary in the later case of Behn *v.* Burness.[1]

The decision has no application unless there is a mistake as to the genuineness or identity of the thing sold as distinguished from its qualities or attributes and perhaps not even in such a case unless the thing transferred is worthless, so that there is a total failure of consideration.

Professor Mechem seems to read the English books as I do,[2] and Mr. Gould, in the latest edition of Parsons on Contracts,[3] says: "If he (i. e., the buyer) does not return the goods within the reasonable time allowed for inspecting them, he can treat a misdescription only as a collateral warranty, and not as a condition entitling him to rescind the contract of sale."

I find it hard to suppose that my learned critic can have disregarded the authorities to which I have referred. I see but one logical way of escape for him, however, and as will be seen I regard this way though logical as not legally permissible. It may be argued that where a contract to sell goods is subject to a condition the title will never pass if the condition is not performed, so that the buyer will in every jurisdiction be enabled to reject the goods unless he has waived the condition and in that event he will be unable to reject or return the goods in any jurisdiction.[4] I do not wish to allow questions of legal nomenclature to obscure my meaning, and I will, therefore, put a concrete case to show what I believe to be the insufficiency of the argument I have just supposed. A contracts to sell to B a sound saddle horse. No horse is specified at the time of the contract. Later A tenders a specific horse as his com-

[1] (1863) 3 B. & S. 751, quoted *ante*.

[2] See extract from Mechem on Sales, infra. §§ 1219, 1220.

[3] 9th edition, Vol. I., 623, *n*.

[4] This may be true of a breach of the warranty or condition that the seller has title. My previous article should have stated that it related only to warranties or conditions of kind or quality. This article also relates to such warranties. As all the decisions cited in my original article and by my critic concern such warranties only, I think there can have been no ground for misapprehension.

pliance with his contract, and as I do not wish to complicate the case with any question of fraud, I will suppose that A believes the horse which he tenders is a sound saddle horse. B inspects the horse, makes such tests and trials as he wishes, takes the horse and pays the price. The horse is in fact unsound, but the defects are latent. The requirement of soundness is clearly not collateral but is part of the description. It is therefore by the current phraseology a condition, and has not been complied with. Nevertheless I cannot doubt that the title has passed. Whether it is proper to say that this is because the condition is waived, when the buyer did not and could not know that the condition was not complied with or whether the explanation given in the extract quoted from Benjamin be the true one I will not discuss lest the argument become one of words. What I wish to assert is that when B later finds that the horse is unsound he cannot return the horse by the English law, but by the Massachusetts law he may. I believe that the authorities referred to in the earlier part of this article bear out this assertion. That the inference I draw from these authorities is not peculiar to myself will appear from the following extract from Professor Mechem's thorough and careful treatise.[1] The extract relates primarily to another question, but it sufficiently covers the point.

"But may this condition precedent have any other effect than to give the buyer the right of rejection? Supposing that the goods when tendered by the seller are obviously not such as the contract contemplated, if the buyer accepts them does he thereby waive any right of recovery or recoupment because of such defects? *Supposing that the goods when tendered are apparently in conformity to the contract and the buyer accepts them only to discover later that they are subject to latent defects not discoverable by ordinary examination —has he now any remedy?* . . . It is held in certain cases that as to all defects at least which were discoverable upon examination, the buyer in the absence of fraud is conclusively estopped by his acceptance, and can afterwards neither reject the goods nor recover upon any surviving warranty. By other cases, however, it is held that the buyer's acceptance even as to discoverable defects is not

[1] §§ 1219, 1220.

necessarily conclusive, and unless it is clear that the buyer intended to waive the defects, the former condition 'survives,' as it is said, *as an implied warranty, which, while not justifying rescission*, will sustain a claim for the damages which the buyer has sustained by reason of the defect."

It must not be supposed that the case which I have put is peculiar. On the contrary it is typical of most of the cases where rescission of a sale for breach of warranty comes in question. Unless the defects in goods are latent the buyer will usually refuse to accept them so that no question of rescission can arise, and if the buyer does knowingly receive or retain defective goods he loses thereby any right to rescind the sale which the local law may allow for breach of warranty. This is true both of collateral warranties and promissory conditions.

I think it clear from the foregoing authorities that no distinction is taken by the law of England or that of Massachusetts between warranties and conditions so far as concerns the question of rescinding an executed sale. The former jurisdiction denies the remedy of rescission whatever the character of the seller's broken promise the latter allows the remedy with equal disregard to the question whether the broken promise was collateral or part of the description. Further, so far as I have been able to discover, no jurisdiction allows the remedy in one class of cases and denies it in the other. In one set of states the rule is that executed sales cannot be rescinded for breach either of collateral warranty or of promissory conditions while in another set of states the remedy is allowed with the same generality that it is denied in the former jurisdictions. This appears from the criticisms of my learned brother upon the decisions which I collected from Alabama, Missouri and Wisconsin.[1] He charges the courts of these States with confusing conditions with warranties. It is true that the courts do not find it necessary to distinguish between the two, for the purpose of considering the buyer's right to rescind an executed sale, but in this these courts are not peculiar.[2]

I submit, then, to the candid reader, that I was right in

[1] 4 Col. Law Rev. 7.

[2] See Hoult *v.* Baldwin (1885) 67 Cal. 610, last paragraph of p. 613.

discussing broadly the question whether rescission of an executed sale is allowable for breach of a promise, whether collateral, part of the description, or wholly implied (as of merchantable quality), and that the criticism upon my article and my cases is misconceived so far as it is based on the assumption that the disputed question of law relates solely to collateral warranties. I do not wish, however, to attempt to distract attention from any weak places there may be in my own armor by attacking vulnerable spots in my adversary. Therefore though it seems to me my learned brother has not distinguished sufficiently in his criticisms between rescission of a contract to sell accompanied by rejection of the goods on the one hand, and rescission of a sale accompanied by a return of the goods on the other, as he does, nevertheless, take the objection to some of the cases that he examines, that the decision merely allowed rescission of an executory contract to sell, I wish to re-examine briefly some of the decisions which he has criticised. If these decisions relate merely to contracts to sell, I admit that they are not in point. It is, of course, law everywhere that the buyer need not accept goods when tendered if they do not conform to the terms of the contract, and, moreover, may take such brief time as is necessary for inspection and testing before deciding whether to take title. Before beginning the examination of the decisions, it is fair to say that when an attempt is made to collect authorities exhaustively upon any point, the cases collected must necessarily vary somewhat in pertinence and cogency. A dictum is important if there is nothing better to be had in the same jurisdiction. If a critic should dissect the decisions cited as supporting the English view, with as keen a scalpel as my learned brother applies to the opposing cases, a similar showing might be made. The leading American case opposed to rescission, Thornton *v.* Wynn,[1] contains only a dictum, as has been noticed by the learned editor of Benjamin on Sales.[2] I do not care, however, to minimise the cases which I have cited as opposed to the theory I sought to uphold. I prefer to take them at their face value, and will seek only to show that the cases upon which I rely as supporting my own view were properly cited. There is

[1] (1827) 12 Wheat. 183. [2] Ed. 1899, p. 959.

a special difficulty in this examination in that the distinction, vital according to the English law, between the right to rescind a contract to sell by rejecting the goods tendered, and the right to rescind a sale by revesting the title in the seller is not always clearly brought out. Under the Massachusetts rule the distinction is frequently not of practical importance, so that courts which adopt that rule are under no necessity of making the distinction. The indiscriminate use of the words "sale" and "contract" also makes trouble.

Of the cases which I cited, the decisions from Nebraska seem to me the weakest. The earlier decision,[1] however, was a case of a sale of a specific machine with a collateral warranty. The buyer testified that he said that if the machine would run as warranted he would take it. This if true would make the performance of the warranty an express condition. The other witnesses to the transaction, however, said nothing of the sort and the court does not rest its decision on the existence of such a condition but, briefly held, that as the machine was not such as was called for by the warranty, the buyer was justified in returning it promptly.

In the later case[2] the instruction of the trial judge fairly interpreted shows that he regarded rescission of a sale for breach of warranty as permissible. The Supreme Court held it was unnecessary to decide the broad question, preferring to affirm the judgment on the special facts of the case.

If there were any more explicit authorities in Nebraska, certainly these cases would be entitled to little consideration, but so far as they go I think they support my contention.

The Ohio decision,[3] which I cited, my learned critic regards as having no bearing on the question "if the head note is thrown aside." The case is certainly unusual in its facts, but I believe the head note to be accurate and the decision to be in point. There was a sale of 5,000 oil barrels, $5,000 was paid on the price and some of the barrels delivered. It is necessary for the buyer to glue

[1] Davis *v.* Hartlerode (1893) 37 Neb. 864.

[2] McCormick Machine Co. *v.* Knoll (1899) 57 Neb. 790.

[3] Byers *v.* Chapin (1876) 28 Ohio St. 300.

oil barrels before using them. The buyer complained that the barrels some of which he had glued and used were leaky and the seller believing this agreed to rescind the sale and repaid part of the price and gave a note for the rest. The action was upon this note and the defence was that the gluing was not properly done. The court sustained the defence on two grounds, of which the first is not material here. The second is expressed in these words: "Another view may be taken. These parties, plaintiff and defendant, were respectively warrantors. Defendant was a cooper who professed to sell oil barrels. He is under an implied warranty that his barrels were fit. Rodgers *v.* Niles (1860) 11 Ohio St. 48.

"The business of plaintiff was to prepare and glue the barrels. He is under an implied warranty that his work is also suitable. When, therefore, he complains to defendant, and claims to rescind the contract, he is understood as asserting that he has fulfilled his warranty, in the matter of gluing and preparing and that it has been properly done. If, therefore, this is not true, and the implied warranty has failed, this is sufficient reason for rescinding the contract based upon it."

It is clear in this case that the title to the barrels passed by the original sale. The contract of rescission, accompanied as it was by a delivery, was equally clearly a resale, and of this resale the court allowed rescission for breach of warranty.

The head note, which my learned brother seems to regard as in point but not justified by the case itself was, under the rules of the Ohio court, written by the judge who wrote the opinion and submitted for revision to the judges concurring in the opinion.[1]

Further evidence, certainly not of great weight but there is nothing opposed to it, that the law of Ohio is as I have stated may be found in the remarks of the court (Taft, J.) in the case of Beresford *v.* McCune,[2] an action for breach o a collateral warranty of soundness given on the sale of a horse. The action was for damages and the defendant objected that the horse had not been redelivered to him. The court, of course, held this unnecessary, saying, however:

[1] See 28 Ohio St. iv. [2] (1870) Cin. Sup. Ct. R. 50.

"If the plaintiff sought to recover the price paid for the horse upon the rescission of the contract, he would have first to give up the horse."

My learned critic says not only that the cases cited from Nebraska and Ohio would have been decided in the same way in England, but that the same is true of the cases cited from Kansas. I believe this to be erroneous so far as Nebraska and Ohio are concerned. As to Kansas it is certainly inaccurate. In Gale Mfg. Co. *v.* Stark[1], there was a sale of a specific harrow and seeder, for which a note was given. There was besides a warranty in these terms: "Warranted to sow from one to four bushels of seed per acre; could not be chocked out." The machine was delivered and used and was not tendered back until more than a year after it was purchased. The purchaser was nevertheless held entitled to rescind and refuse to pay the price. Even if the case be judged by my critic's own tests I am at a loss to guess the reason that it is thrown aside. If the warranty in this case was not collateral, I am sure I cannot tell what a collateral warranty is; and it can hardly be thought that the title had not passed. The language of the court is instructive. "Some courts hold that where the title to the property has passed to the vendee, and no fraud can be shown on the part of the vendor, but only a breach of warranty, the vendee cannot rescind the contract; but other courts hold otherwise, and this court seemingly holds otherwise. (Weybrich *v.* Harris (1883), 31 Kas. 92.) In the case just cited it is held that the vendee has one of two remedies: First, he may return the property and rescind the contract; or, second, he may affirm the contract and sue for damages for the breach of the warranty." The court proceeds "It is not necessary in this case that we should hold that in all cases of a breach of warranty in the sale of personal property the vendee may return or offer to return the property and rescind the contract, but we think that such is the rule for cases like the present, where the property purchased and received is substantially different from what it was warranted to be and will not answer the purpose for which it was warranted." The Kansas court is therefore committed to the doctrine of

[1] (1891) 45 Kas. 606.

rescission, if the breach of warranty is material. If not material the question is still open.

In Louisiana, rescission of a sale is allowed for breach either of express or implied warranty, but in order to entitle the buyer to this relief the breach of implied warranty (or, in the language of the civil law, the redhibitory defect) must be such as to render the thing sold either useless or its use so imperfect and inconvenient that the buyer would not have purchased it had he known of the vice. It is obvious that in most cases of breach of warranty this would be true. Breach of an express warranty, however, will not authorize rescission unless the quality warranted "was the principal motive for making the purchase." Doubtless this is an important qualification of the right.

California and North Dakota my learned critic not only removes from the list of states which allow rescission but places in the list of states which deny the remedy. The Codes of these states provide.[1]; "The breach of a warranty entitles the buyer to rescind an agreement for a sale, but not an executed sale, *unless the warranty was intended by the parties to operate as a condition.*" The force of this provision depends on the effect given it by the Supreme Courts of the states in question. The section permits rescission of an executed sale if the warranty was intended to operate as a condition. If this intention could be sought only in express words the result would be the same as the English law. But that does not seem to be the result the California or North Dakota courts reach. In Hoult *v.* Baldwin,[2] the title to a machine seems to have passed and there was both a collateral warranty in writing that the machine would do good work and also, under the Code, implied warranties of fitness. The court said: "Having

[1] Cal. C. C. Sec. 1786; N. Dak. C. C. Sec. 3988.

[2] (1885) 67 Cal. 610. My learned critic, as it seems to me, makes two slips in stating this case. He says the agreement was for the sale of a machine which would do good work. This is not wholly accurate; it was for one of several machines, which the buyer inspected, but which he refused to buy without a guaranty that it would do good work. Such a guaranty was given in writing. This was surely a collateral warranty, though, like the court, I do not think that makes any difference. However, this may be, the further statement that the court said that the written guaranty and the warranties provided for in the code were "conditions of the sale" is erroneous. The statement of the court applies only to the implied warranties provided for by the code.

taken the machine then under a warranty, whether it be that expressed in the writing or provided by the Code, or both, the defendant had the right, if there was a breach of the warranty, that is, if in any respect the machine was not what it was warranted to be, to rescind the sale by returning or offering to return it to the plaintiffs." In Canham *v.* Plano Manufacturing Co.[1] a machine was sold with a warranty, apparently collateral. The buyer gave three notes, two of which he subsequently paid. This action was to recover back the money so paid and the amount of the third note which had been negotiated. The machine was kept and used for over a year. During this time the agent of the seller repeatedly promised to put it in order and requested the plaintiff to keep it. These facts were important as excusing the plaintiff from the imputation of laches, but there was no evidence of fraud or of any agreement to take the machine back if it did not work. It certainly cannot be thought that the title had not passed. There was a new warranty given after the sale that the machine would do good work the next season which the court held given for good consideration. The court say: "There being a breach of a former warranty, plaintiff had it in his power to return the binder and have back his notes or a new machine in place of the defective one." The new warranty given instead, the court said "amounted, in effect, to a keeping of the machine by the plaintiff on trial, with a right to return it next year if it should fail to work as stipulated by defendant's agent." This is the effect of a warranty under the Massachusetts law. It certainly is not the effect under the English law.

The decisions in Alabama, Missouri and Wisconsin also are criticised but it is admitted that they "undoubtedly, * * * contain numerous dicta." If the distinction which the learned critic takes, and which the courts do not take between rescission of title for breach of an implied warranty and for breach of an express warranty be eliminated, the so-called dicta are in most of the cases necessary to the actual decisions. In any event there can be no more doubt as to the law of these States than as to the law of

[1] (1893) 3 N. Dak. 229.

Massachusetts and it would be idle to examine the numerous cases.

In my original article I omitted two states which adopt the Massachusetts rule, Arkansas[1] and Maryland[2].

My learned brother has confined his essay to an examination of the authorities cited by me as supporting the doctrine of rescission of sale for breach of warranty. He has not discussed the merits of the doctrine apart from authority. Of course, it is his right to take for discussion any one of my statements which seems to him most questionable, and a careful examination of the exact amount of authority supporting one side or the other of the argument is in itself important and useful. I have, therefore, gladly joined in debate on this limited ground. But before closing my remarks, I wish to go beyond the limits of a reply to my learned critic and to return to the larger field of discussion of my original article.

When I first wrote I was prepared to admit that the weight of actual authority was in favor of the English view. I am still ready to admit this. I thought and still think, however, that the balance of judicial authority in favor of the English view is much less than is ordinarily supposed. Until a few years ago the only text book on sales in much use was the English treatise of Benjamin[3], and this doubtless tended to impress upon student and teacher, practitioner and judge the English doctrine. The amount of support that the contrary doctrine has found has not unnaturally been imperfectly noted. The question, however, in which I am primarily concerned, and I cannot help thinking it is the really vital question, is not whether the courts of ten or twelve or fourteen jurisdictions or more or less support the Massachusetts rule but what is the intrinsic merit of the rule itself. Nearly

[1] Plant *v.* Condit (1861) 22 Ark. 454, 458; Righter *v.* Roller (1876) 31 Ark. 170, 173, see also Weed *v.* Dyer (1890) 53 Ark. 155. I admit the expressions of the court in favor of rescission were dicta, but repeated dicta may make the law of a state as clear as a decision.

[2] Taymon *v.* Mitchell (1849) 1 Md. Ch. 496; McCeney *v.* Duvall (1863) 21 Md. 166; Horner *v.* Parkhurst (1889) 71 Md. 110. Compare Horn *v.* Buck (1877) 48 Md. 358, 372; Columbian Iron Works *v.* Douglas (1896) 84 Md. 44, 64.

[3] The annotations of the American editors on this point are inadequate.

half of the United States have as yet neither decision nor dictum in regard to the matter. When the question is presented to the courts of these states I cannot believe that the proper way to decide it is by a popular vote of jurisdictions which have previously decided it. The Massachusetts rule has certainly sufficient judicial authority behind it to entitle it to consideration on its merits in a jurisdiction unfettered by authority. It is still more clear that a legislature called upon to deal with the question should adopt the rule which is intrinsically superior. As a draftsman, employed by committees on Uniform State Legislation, to draw a code of the law of sales, I have ventured to adopt the Massachusetts rule, and my original article, though it did not so state, was written in defence of my action. I believe my defence is made good if the rule I have chosen is in itself the better.

I will not repeat here what I have previously written with a view to prove the superiority, theoretical and practical, of the doctrine I advocate, but I must add that it would be hard to find a better illustration of the subtle and confused character of the English law of warranty than that my learned brother and myself, whose occupation requires us to teach that law, should be apparently at variance as to what it is.

SAMUEL WILLISTON.